

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Customs Appeal No.41154 of 2018

(Arising out of Order-in-Appeal C. Cus. I No. 18/2018 dated 7.2.2018 passed by the Commissioner of Customs (Appeals – I), Chennai)

Commissioner of Customs

Chennai VII Commissionerate
New Custom House
Meenambakkam, Chennai – 600 027.

Respondent

Vs.

M/s. Vasta Biotech Pvt. Ltd.

SVN House, New No. 10, Old No. 90
C.P. Ramaswamy Iyer Road
Alwarpet, Chennai – 600 018.

Appellant

APPEARANCE:

Shri P. Narasimha Rao, Authorized Representative and
Shri Harendra Singh Pal, Authorized Representative for the Appellant
Shri Jaydeep Patel, Advocate, Shri Vishnu Mohan, Advocate and
Shri Ashutosh Kumar, Advocate for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40930/2024

Date of Hearing : 03.07.2024

Date of Decision: 23.07.2024

Per M. Ajit Kumar,

This appeal is filed by the appellant-department against Order in Appeal C. Cus. I No. 18/2018 dated 7.2.2018 passed by the Commissioner of Customs (Appeals – I), Chennai. (impugned order)

2. Brief facts of the case are that the respondent M/s. Vasta Biotech Pvt. Ltd. had filed Bill of Entry dated 28.1.2009 for the clearance of the goods declared as "Martech DHA" which as stated by them are unsaturated acyclic monocarboxylic acids being a derivative of linolenic acid, under CTH 29161590. The respondents were earlier classifying

the goods under CTH 130219 and consequent to a legal opinion they felt that the product was more appropriately classifiable under CTH 29161590 as the Chapter covers linolenic acids. The original authority vide Order in Original dated 24.2.2009 reclassified the goods under CTH 13021990 based on the Chapter notes on the reasoning that it is an extract from marine algae, that CTH 13091990 specifically classifies vegetables saps and extract and there is no exclusion found for item in the Chapter notes. Aggrieved by the Order in Original dated 24.2.2009, the importer filed an appeal before Commissioner of Customs (Appeals) who vide Order in Appeal dated 16.6.2011 remanded the issue back to the original authority for fresh consideration and mentioned that the product was obtained from algae and CTH 2106 appeared to be the appropriate classification. The department filed an appeal before CESTAT against the said order of Commissioner (Appeals). The Tribunal vide Final Order dated 27.8.2013 remanded the matter back to the original authority. Vide Order in Original dated 5.5.2017, the lower authority classified the goods under CTH 29161590 as claimed by the respondent. Hence department filed an appeal before Commissioner (Appeals) against the said Order in Original dated 5.5.2017. The learned Commissioner (Appeals) vide the impugned order rejected the appeal of the department on the ground of time-bar and also held that the classification is settled as per General Rules of Interpretation and merits classification under CTH 29161590. Aggrieved by the said order, department has filed the present appeal before this Tribunal.

3. Shri P. Narasimha Rao, learned Authorized Representative and Shri Harendra Singh Pal, learned Authorized Representative appeared

for the appellant-department and learned counsel Shri Jaydeep Patel appeared for the respondent-importer.

3.1 Shri P. Narasimha Rao learned AR for the appellant-department submitted that the matter was being appealed on two grounds. Firstly, that the appeal filed before the Commissioner (Appeals) was not time barred and secondly on the merits of the classification of the impugned goods under CTH 2106. He stated that the review order which was filed before the Commissioner (Appeals) on 4/9/2017 was within four months of the passing of the OIO dated 5/5/2017, and hence the appeal was not time barred. Passing of review order within three months of the date of communication of the OIO by the Committee of Commissioners under section 129(D)(3) is an internal procedural matter and the substantive condition is to file the appeal within one month of the passing of the review order as per section 129(D)(4) of the Customs Act and within the overall time frame of four months. The same has been complied with by the department and hence this portion of the impugned order merits to be set aside. He referred to the ratio laid down by the Larger Bench of the Tribunal in the case of **Commissioner of C. Ex, Raipur Vs Monnet Ispat & Energy Ltd** [2010 (257) ELT 239 (TRI – LB)], which was upheld by the Hon'ble Supreme Court in **Commissioner Central Delhi Vs Kap Cones** [2015 (322) ELT 142 (SC)], in support of his stand. On merits, he stated that the imported item Martek DHA Algal oil is not a separate chemically defined organic compound as per note 1(a) to Chapter 29 of CTA, 1975, as it is in the form of micro encapsulated oil in powder form with DHA % at 10-17 only. Therefore, the product is not DHA per se, but is a product containing DHA and can't be considered as defined chemical

compounds in terms of chapter 29. He drew the analogy of the classification of camphor a chemically defined organic compound under CTH 2914 2110 and 2914 2120, whereas camphor oil is classified under CTH 3301 2941 as discussed at para 22.14 of the OIO. The Ld. AR referred to the definition of 'food' as per section 3(j) of FSAS Act, 2006 and Regulation 6 of FSSAI wherein health supplements are stated to contain concentrated source of plants or botanicals nutrients among others. He referred to the impugned goods as per the product literature of the suppliers, M/s Martek Biosciences, USA to state that DHA Algal oil is used as a novel food ingredient/food supplement in various food and milk items. He drew attention to the Technical Evaluation Report compiled by ICF international for USDA National Organic Program, wherein it is further mentioned that DHA Algal oil is used as an ingredient, as a source of DHA in foods, beverages, etc. That, the Food, Safety and Standards (Food Products Standards and Food Additives) Regulations 2011, mentions Algal and fungal oil as source of DHA and ARA at the level of maximum 0.5% DHA of total fatty acids and ratio of ARA: DHA as 1:1 minimum. Reliance was also placed on Cross Ruling N293133 dated 19/01/2018 of US customs whereby algae oil powder is classified under heading 2106 90 9898 used in the manufacture of infant formula, dietary supplements and various food products. He mentioned that even the importers own website mentions DHA oil as useful in the food, beverage, dietary supplement, pharmaceutical and Allied industries. The importer, M/s Vatsa Biotech's marketing stand of the subject goods as food ingredients is completely in contradiction of their stand of the subject goods as non-food items and as a pure chemical before the AA. He drew attention to the website amazon.in to

show how the DHA Algal oil was being marketed. He hence prayed that the appeal may be allowed.

3.2 The Ld. Counsel for the respondent at the outset stated that based on the averments made by the appellant and the decision of the Hon'ble Supreme Court in **Kap Cones** (supra), they are not contesting the issue of time bar. He stated that the DHA was imported by the respondent from Martek Biosciences, USA (since merged with DSM Nutritional Products, USA) under the brand name "Martek DHA" (later "life's DHA"). The said DHA was extracted from marine algae. It is an omega-3 fatty acid, an unsaturated acyclic monocarboxylic acid and a derivative of linolenic acid. Unsaturated acyclic monocarboxylic acids are specified in CTH 2916 and linolenic acid and its derivatives are specified in CTH 291615. DHA is defined by the molecular formula $C_{22}H_{32}O_2$ and is therefore represented by a definitive structural diagram. It is accordingly a separate chemically defined compound, and since it is a compound having carbon atoms, it is a separate chemically defined organic compound. DHA plays an important role in brain function and eye function. It is an intermediate added industrially in microscopic quantities to fortify foods and supplements intended for infants and pregnant and lactating mothers. The DHA as imported contains various other substances which are in the nature of impurities, and which are originally contained in the marine algae, and which cannot be separated. The DHA extracted thereby is highly susceptible to oxidation, and therefore requires stabilization, which is achieved by the addition of stabilizers. Further, the extracted DHA may also be converted to powder through microencapsulation for ease of storage and transportation. As per note 1(a) of chapter 29 of the Customs

Tariff, the headings of the said chapter apply to separate chemically defined organic compounds, whether or not containing impurities. In addition, as per the HSN Explanatory Notes for chapter 29 and chapter 28, a product falling under one of these chapters may contain impurities, i.e. substances whose presence in the product results solely and directly from the production process and which may be unconverted starting materials or impurities present in the starting materials. Further, as per note 1(f) of Chapter 29, the products mentioned in note 1(a) may contain added stabilizers (including anti-caking agent) for their preservation or transport. In view of the above, the respondent sought classification of the DHA imported by it under CTH 2916 1590 which was accepted both by the Original Authority and by the Commissioner (Appeals) in the impugned order. He hence prayed that the appeal may be rejected.

4. We have carefully gone through the appeal and have heard the rival parties. We find that the following issues arise for consideration; (A) Whether the appeal before the Commissioner (Appeals) is time barred.

(B) Whether the goods as imported under the brand name "Martech DHA" by the respondent are DHA (docosahexaenoic acid) classifiable under CTH 29161590 (respondent) or include other ingredients giving the goods the characteristic of food preparation under CTH 21069099 (revenue).

5. As regards the question of time bar we find that revenue has averred that the passing of review order within three months of the date of communication of the OIO by the Committee of Commissioners under section 129(D)(3) is an internal procedural matter and the

substantive condition is to file the appeal within one month of the passing of the review order as per section 129(D)(4) of the Customs Act and within the overall time frame of four months. We find that the matter has been examined and decided as per the ratio laid down by the Larger Bench of the Tribunal in the case of **Commissioner of C. Ex, Raipur Vs Monnet Ispat & Energy Ltd** [2010 (257) ELT 239 (TRI – LB)], which was upheld by the Hon’ble Supreme Court in **Commissioner Central Delhi Vs Kap Cones** [2015 (322) ELT 142 (SC)]. The Hon’ble Supreme Court in the said judgment held as under;

27. At this juncture, we think it appropriate to refer to the Full Bench decision of the tribunal in Monnet Ispat & Energy Ltd. (**Commissioner of C.Ex., Raipur vs. Monnet Ispat & Energy Ltd. - 2010 (257) ELT 239 (Tri.-LB)**). In the said case, interpreting the provisions, the Full Bench of the tribunal has recorded the following conclusion:-

“The Tribunal has ample power to condone the delay in filing the appeal including the one filed under Section 35E(4) of the said Act. The period which can be condoned in relation to filing of the appeal under Section 35E(4) of the said Act would include the period availed by the review committee in terms of Section 35E(1) or 35E(2) of the said Act. As regards the appeals by the Department in terms of Section 35E(4), the same should be filed within one month from the date of communication of the order under sub-section (1) or sub-section (2) of the said section but not beyond four months from the date of communication of order of the adjudicating authority to the review committee. In case there is any delay in this regard, the same can be condoned in exercise of powers under Section 35B(5), on being satisfied about sufficient cause for such delay and power to condone the delay would include the period availed under Section 35E(1) or (2) by the reviewing committee to decide about filing of the appeal.”

28. In our considered opinion, the analysis made by the Full Bench is correct in view of the opinion expressed by us in the preceding paragraph and accordingly we hold the said view to be correct.”

(emphasis added)

In the light of the said judgement, we find that the appeal filed by revenue before the Commissioner (Appeals) was not time barred and that the matter related to classification needs to be examined and disposed of on merits.

6. Before taking up the second issue, we find that the appellant-department have, in their oral and written submissions before us, made reference to certain 'evidence' downloaded from the internet site amazon.com. We had during the hearing stated that the said evidence could not be admitted. Rule 23 of the **Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982** states that the parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, before the Tribunal. Thus, the general principle is that the appellate court should not travel outside the record of the Original Authority, unless the Tribunal itself feels the need to do so. No application was filed and prayer made by the Appellant to produce additional evidence before us. Had it been done it would have given the respondent a chance to file additional grounds / evidence as a rebuttal and to test whether the evidence was of an unimpeachable character. The power to allow additional evidence at the Tribunal level, whether on fact or law, oral or documentary is discretionary in nature. The parties are not entitled, as of right, to the admission of such evidence. As per judicial pronouncements an application for additional evidence is not allowed when:

1. no reasonable care or due diligence was shown in presenting the evidence at the Original forum.
2. the evidence would introduce a new cause of action which completely alters the appeal and would aid the appellant to establish a new case in an appeal, which seeks to take away a vested right of limitation or any other valuable right accrued to the other party. This could then lead to unending legal disputes.

3. no compelling reason or substantial cause has been shown to permit the additional evidence
4. the additional evidence seeks to fill in gaps or restore weak areas in the case.
5. the rival party has not been given an opportunity to rebut it.
6. the additional evidence is not of an unimpeachable character.

Thus, it is clear, the admission of additional evidence is not intended to be done routinely and merely for the asking. In the present case there has not even been a formal application to admit additional evidence, further the print out of advertisement material sought to be presented is hit by almost all the points mentioned above. The Hon'ble Apex Court in **Hewlett Packard India Sales Pvt. Ltd. Vs Commissioner of Customs (Import), Nhava Sheva** [CIVIL APPEAL NO 5373 OF 2019, Dated 17/01/2023] cautioned against the use of internet material as under;

14. At the outset, we must note that the adjudicating authorities while coming to their respective conclusions, especially the Commissioner of Customs (Appeal) have extensively referred to online sources such as Wikipedia to support their conclusion. While we expressly acknowledge the utility of these platforms which provide free access to knowledge across the globe, but we must also sound a note of caution against using such sources for legal dispute resolution. We say so for the reason that these sources, despite being a treasure trove of knowledge, are based on a crowdsourced and user generated editing model that is not completely dependable in terms of academic veracity and can promote misleading information as has been noted by this court on previous occasions also. The courts and adjudicating authorities should rather make an endeavor to persuade the counsels to place reliance on more reliable and authentic sources.

(emphasis added)

We hence disregard the internet-based print-outs of advertisement sought to be used by the appellant.

7. The classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the

Department intends to classify the imported goods under a particular category different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. The judgments of the Hon'ble Supreme Court in **Union of India v. Garware Nylons Ltd.** [1996 10 SCC 413]; **H.P.L Chemicals vs. Commissioner of Central Excise**, [2006 (197) E.L.T. 324 (S.C.)]; **Puma Ayurvedic Herbal (P) Ltd. v. Commissioner of C. Ex., Nagpur** [2006 (196) E.L.T. 3 (S.C.)], declare the law rendered in the case of classification under the Central Excise Act and **Nanya Imports and Exports Enterprises Vs Commissioner of Customs, Chennai** [2006 (197) E.L.T. 154 (S.C.)] in a Customs matter.

8. For ease of reference disputed Tariff entries with description are given below;

A) CTH 2916.

2916	- Unsaturated acyclic monocarboxylic acids, cyclic monocarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulphonated, nitrated or nitrosated derivatives:
2916 11 00	-- Acrylic acid and its salts
2916 12	-- Esters of acrylic acid
2916 12 10	--- Butyl acrylate
2916 12 90	--- Other
2916 13	-- Methacrylic acid and its salts
2916 13 10	--- Methacrylic acid
2916 13 20	--- Salts of methacrylic acid
2916 14 00	--- Esters of methacrylic acid
2916 15	-- Oleic, linoleic or linolenic acids, their salts and esters
2916 15 10	--- Oleic acid
2916 15 90	--- Other

B) CTH 2106

2106	- Food preparations not elsewhere specified or included
2106 10 00	- Protein concentrates and textured protein substances
2106 90	- Other
	--- Soft drink concentrates
2106 90 11	---- Sharbat
2106 90 19	---- Other
2106 90 20	--- Pan masala
2106 90 30	--- Betel nut product known as "supari"

2106 90 40	---	Sugar syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup
2106 90 50	---	Compound preparations for making non-alcoholic beverages
2106 90 60	---	Food flavouring material
2106 90 70	---	Churna for pan
2106 90 80	---	Custard powder
	---	Other
2106 90 91	----	Diabetic foods
2106 90 92	----	Sterilized or pasteurized millstone
2106 90 99	----	Other

9. We now examine the issue of classification. Revenue has contended that since DHA is used to fortify human food and is used in food supplements, it has the characteristics of a “food preparation” and must be classified under CTH 2106 as “Food preparations not elsewhere specified or included”. They have relied on the HSN Explanatory Notes for CTH 2106, which states;

“Preparations often referred to as food supplements, based on extracts from plants, fruit concentrates, honey, fructose, etc and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packing with indications that they maintain general health or well-being.”

They are of the opinion that the note clearly clarifies that the impugned goods which are manufactured from the extract of algae, which is undoubtedly a plant source are specifically covered under the CTH 2106. The respondent has stated that there is a fundamental difference between a “food preparation” which is marketed and consumed as such, and a product which is used in microscopic quantities in the manufacture of a “food preparation”, as in their case. The HSN Explanatory Notes cited by revenue has failed to note that the goods do not contain “added vitamins” and have not been “put up in packaging with indications that they maintain general health or well-being”, as required for the goods to be classified under CTH 2106.

10. The respondents have submitted that if the goods are rightly classifiable under Chapter 29, then they cannot go out of Chapter 29 merely based on the end use of the goods. There are several items specified in Chapter 29 which have various uses such as uses in medicine, perfumery and food. These items, however, do not go out of Chapter 29 merely on that ground. They have given the following examples taken from the HSN Explanatory Notes for Chapter 29:

- a) CTH 2918: Citric acid is used extensively in food and beverages.
- b) CTH 2922: Glutamic acid is used in medicines and food.
- c) CTH 2923: Soya bean lecithin is used as an emulsifying and dispersing agent in food.

11. We find that the condition of the goods at the time of import, which is the taxable event, is the material factor for the purpose of classification. The goods are imported in bulk and can be used in different industries. Revenue has in its submissions stated that the respondents own website mentions DHA oil as useful in the food, beverage, dietary supplement, pharmaceutical and Allied industries. This points to the versatile use of the impugned goods. Thus, the goods admittedly do not have a sole and principal use, whereby the end use to which the product is put to by itself cannot be determinative of the classification of the product here. If the good in this case has to take colour from its end product, the classification would change every time it is imported for use in different industries. This would be legally untenable.

12. The Hon'ble Delhi High Court in its judgment in **Amazon Wholesale India Private Limited Vs Customs Authority of Advance Ruling, New Delhi & anr.** [CUSAA 76/2022 & CM APPL.

23914/2022 (Stay), dated: 11/12/2023] has stated as under, with respect to the different tests for classification;

“37. In our considered opinion, the tests evolved by courts in connection with the issue of classification such as nomenclature, common parlance, principal function, primary and incidental purpose are all aids and rules of guidance liable to be cumulatively borne in consideration in order to ascertain the true character of a product. While none of those tests are accorded preeminence, it is ultimately for the authorities to ascertain which of those rules would merit adoption and represent an accurate understanding of the nature of the product.”

(emphasis added)

Hence it would be essential to cull out the nature of the product, before arriving at the proper classification of the impugned goods.

13. Revenue has drawn attention to various legal provisions / Acts / Reports and also to foreign sources to arrive at the nature of the impugned goods. It is to be stated that the primary method for the classification of imported goods under the Customs Tariff is by referring to the General Rules of Interpretation of the Tariff and in case of doubt to take assistance from the HSN. In case the matter is not resolved by this process, aid can be taken from external judgments, references etc. Even so the in **Hari Khemu Gawali Vs Deputy Commissioner of Police, Bombay and another** [AIR 1956 SC 559], a **Constitution Bench** of the Apex Court has cautioned as under:

"It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

14. In its judgment in **Commissioner of Customs and Central Excise, Amritsar (Punjab) Vs. D.L. Steels etc.** [2022 SCC OnLine SC 863], the Apex Court discussed the issue of classification and the assistance that can be taken from the HSN, as extracted below.

9. The Harmonised System of Nomenclature, developed by the World Customs Organisation, has been adopted in India by way of the Customs Tariff Act, 1975, though there are certain entries in the

Schedules to this Act which have not been assigned HSN codes. The Harmonised System is governed by the International Convention on Harmonised Commodity Description and Coding System, which was adopted in 1983, and enforced in January, 1988. This multipurpose international product nomenclature harmonises description, classification, and coding of goods. While the primary objective of the HSN is to facilitate and aid trade, the Code is also extensively used by governments, international organisations, and the private sector for other diverse purposes like internal taxes, monitoring import tariffs, quota controls, rules of origin, transport statistics, freight tariffs, compilation of national accounts, and economic research and analysis. **In the present times, given the widespread adoption of the Harmonised System by over 200 countries, it would be extremely difficult to deal with an international trade issue involving commodities, without adverting to the Harmonised System. The Code is the bedrock of custom controls and procedures.** The HSN consists of over 5000 commodities groups, which are structured into 21 Sections and 97 Chapters, which are further divided into four and six digit sub-headings. Many custom administrations, like India, use an eight or more digit commodity coding system, with the first six digits being the HSN code.

10. Classification under the Harmonised System is done by placing the good under the most apt and fitting sub-heading. This is done by choosing the appropriate Chapter, Heading, and sub-heading respectively. To facilitate interpretation and classification, each of the 97 Chapters in the HSN contain corresponding Chapter Notes, General Notes, and Explanatory Notes applicable to the Headings and sub-headings within that Chapter. In addition, there are six General Rules of Interpretation applicable to the Harmonised System as a whole.

(emphasis added)

It would hence be profitable to examine the issue primarily as per the provisions of the Customs Tariff, with reference to the HSN wherever required, and only if the issue is not resolved would it be required to take the help of extrinsic aid in construction of the statute.

15. It is the departments stand that the impugned goods 'MARTEK DHA KSF 35', - Docosahexaenoic Acid, as imported is manufactured from Oil extract of Marine Algae which is a plant source and is micro encapsulated in powder form. It is not a defined chemical to be classified under CTH 2916 as % of DHA is in the range of 10-17 only as per the web site of the supplier and are used in infant food preparations. As per trade parlance, explanatory notes to HSN for 2106 and TRU's clarification letter dated 27/07/2017, the goods are rightly

classifiable under 2106 as food supplement/ ingredients. Para 2.15 of the Grounds of Appeal which reproduces Board's letter dated 04/09/2017 and encapsulates the views of Revenue is reproduced below.

2.15 Further, the Tariff Unit, CBEC, New Delhi vide letter in file F. No. 521/07/2017-STO (TU) dated 27.7.2017 has clarified about the classification issue of the subject goods "Market DHA" in powder form on the basis of its composition and form is appropriately classifiable under CTH 2106 90 99. The relevant parts are reproduced below:-

Para 2 -

- (i) "The issue has been examined on the basis of the product composition as mentioned in the OIO dated 5.5.2017. On that basis it is clear that the product is in two forms: i) Oil form ii) Powder form". "The product in oil form is basically DHA Algal Oil which is nothing but a vegetable oil extracted from the algae containing DHA. DHA powder is nothing but the same Algal oil microencapsulated in the powder form".
- (ii) "Therefore, the product is not DHA per se, but it is a product containing DHA and cannot be considered as defined chemical compound in terms of chapter 29 and does not merit classification under chapter 29."
- (iv) "The product in the powder form on the basis of its composition and form is appropriately covered by the Heading 2106 and merits classification under CTH 2106 90 99".

Para 3 - "In view of above, the Audit para which deals with product in powder form only, have been admitted by Board".

Para 4 - "In the light of above, it is requested to consider the views expressed in Para 2 of this letter while reviewing the O-in-O dated 5.5.2017."

16. We find that Boards letter dated 04/09/2017 is not a circular but only issued in response to an audit objection. It does not have the binding effect of a circular on the field formations at large. Further it does not give adequate reasons for its views. However, Revenue's position for the classification of the impugned goods under CTH 2106 9099 can be stated as under;

- (i) The product is not DHA per se. It is a product containing 10-17 % DHA and cannot be considered as a defined chemical compound in terms of chapter 29 and does not merit classification under chapter 29. There is no mention of linolenic acid in the Bill of Entry. The product in powder form on the basis of its composition and form is appropriately covered by the Heading 2106 and merits classification under CTH 2106 9099.
- (ii) The importers own website mentions DHA oil as useful in the food, beverage, dietary supplement, pharmaceutical and Allied industries. The supplier Martek Biosciences, USA's product literature states that DHA Algal oil is used as a novel food ingredient/food supplement in various food and milk items. Hence it is a manufactured product used to supplement human food for promoting health and wellness and has acquired the characteristics of food preparation covered under chapter 2106.

17. As per the respondent DHA is an Unsaturated Acyclic Monocarboxylic Acid and is defined by the Molecular Formula **C₂₂H₃₂O₂** and is therefore represented by a definitive structural diagram. They rely upon the Technical Opinion dated 3-10-2016 given by the Department of Biotechnology, IIT Madras. They also rely upon the decision of this Tribunal in **Vipor Chemicals Pvt. Ltd. v. CC** [2003 (156) ELT 420] which holds that a technical opinion stating that a product is a separate chemically defined organic compound is conclusive for classification under Chapter 29. Further Unsaturated Acyclic Monocarboxylic Acids are specified in CTH 2916 and Linolenic Acid and its Derivatives are specified in CTH 291615. Revenue's argument that the goods cannot be classified under CTH 291615 since there is no mention of linolenic acid in the Bill of Entry is totally misconceived since what is required to be stated in a Bill of Entry is the description of the goods and not what the goods are a derivative of. Once the goods are described as DHA, and DHA is shown by technical material to be an Unsaturated Acyclic Monocarboxylic Acid falling under

CTH 2916 and a derivative of Linolenic Acid falling under CTH 29161590, the same would be classifiable there under.

18. We find that the case of the department is that the impugned goods which are a product containing only 10-17 % DHA, cannot be considered as a defined chemical compound in terms of chapter 29.

19. It's the respondent's case that DHA is extracted from marine algae. The process involves subjecting the marine algae to fermentation followed by the rupturing of the cells of the marine algae by enzyme action. The resulting extract of DHA in "oil" form is highly susceptible to oxidation and requires stabilization through the addition of stabilizers. To make the storage and transportation of DHA more convenient, it can be converted to "powder" form through microencapsulation. DHA in "powder" form is nothing but microencapsulated DHA "oil", which has also been accepted by Revenue at para 2.1 of their appeal and in Boards letter dated 27/07/2017 (*supra*). In both "oil" form and "powder" form, the product contains, besides DHA, only impurities and added stabilizers for preservation and transport. They rely on the judgment of this Tribunal in **CC v. Indian Petrochemical Corporation Ltd.** [2011 (274) ELT 299], which holds that a separate chemically defined organic compound is classifiable under Chapter 29 – notwithstanding the presence of impurities, the elimination of which is not technically possible / commercially practical.

20. We find that as per Note 1(a) of Chapter 29 of the Customs Tariff, the headings of the said Chapter apply to separate chemically defined organic compounds, 'whether or not containing impurities'. Hence the

chapter note allows the presence of impurities, if any, in separate chemically defined organic compounds. In addition, as per the HSN Explanatory Notes for Chapter 29 and Chapter 28, a product falling under one of these chapters may contain impurities, i.e. substances whose presence in the product results solely and directly from the production process and which may be unconverted starting materials or impurities present in the starting materials. Further, as per Note 1(f) of Chapter 29, the products mentioned in Note 1(a) may contain added stabilizers (including anti-caking agent) for their preservation or transport. Revenue, on whom lies the burden of proving the classification of goods, has not demonstrated that the additional ingredients in the impugned goods are not/ are not only impurities and stabilizers but include other ingredients giving DHA the characteristic of food preparation.

21. We find that the Commissioner (Appeals) in his order at para 5.5 has stated that the goods are “highly unstable, subject to rapid oxidation and carry a typical algal odour, making it totally inappropriate to call them food or food preparation or food supplement” and the goods are “not understood in common parlance as food or food preparation.” has not been directly disputed.

22. As discussed above, revenue itself has alleged that the impugned goods are used in a host of industries like food, beverage, dietary supplement, pharmaceutical and allied industries. However, it has not been shown as to why “Martech DHA” has acquired the characteristics of food preparation alone and is not for example an ingredient of the pharma or allied industry when the goods are supplied to the said industries. The problem of trying to classify goods as per their

perceived end use without first examining that the other ingredients present are permissible or not as per the chapter notes and whether they alter the nature of the product, is a fatal flaw in the arguments set out by Revenue. Further the Assistant Commissioner and the Commissioner (Appeals) have held, based on customer declarations produced before them, that DHA, which contains impurities and added stabilizers, is known in trade parlance as "DHA". Revenue has not challenged this finding or produced contrary evidence. Hence the 'trade test' is also satisfied. In fact during the oral submissions revenue had stated that certain subsequent imports of the impugned goods were made through Mumbai and were subjected to provisional assessment on account of the pendency of the present appeal. However, even in that case as per dated 22/02/2018 addressed to DRI, the Commissioner of Customs (Mumbai) is of the view that the goods are rightly classifiable under CTH 29161590. The findings at Para 22.12 and 22.13 of the OIO dated 05/05/2017 are very important. It states that the imports of the same goods at Mumbai cargo and seaports have been cleared under Chapter 29, (which is also validated by the letter dated 22/02/2018 of the Commissioner of Customs - Mumbai) and also by domestic manufacturers. The paras are reproduced below.

22.12 It is further noticed that the same goods have been imported through the Delhi Air Cargo under CTH 2916 1590; through Mumbai Air Cargo under CTH 2917 3990 and 2915 7090 and through Nhava Sheva Port Mumbai under CTH 29161990. The referred imports were happened between 2014 and 2016.

22.13 References of two domestic manufacturers viz. India Glycols Limited, Dehradun, Uttarakhand (ECC No. AAC17246P-XM-004) and Rampex Labs Pvt. Ltd. Medak Dt. Telangana (ECC No. ACCR7394HXM-002) have come to the notice that they are manufacturing Docosahexanoic Acid-in oil and powder by classifying under CTH 2916 1590."

Revenue has been silent on this very crucial information which was very much verifiable. Further Board has curiously vide its letter dated 27-07-2017, examined the above OIO but deemed it fit only to address the Commissioner of Customs, Chennai alone in the matter and not issue a clarificatory Circular to the field formations and trade in general for the sake of uniformity of classification.

23. Hence from the discussions it is seen that;

- (i) DHA in "powder" form is nothing but microencapsulated DHA "oil" as per the respondent, which has also been accepted by revenue at para 2.1 of their appeal and in Boards letter mentioned above.
- (ii) the goods have been imported in bulk form and are known in the trade as DHA.
- (iii) as per the technical opinion given by IIT, which was reproduced at para 22.5 of the OIO, the impugned goods, in oil and powder form, is a separate chemically defined organic compound (DHA) that is an unsaturated acyclic monocarboxylic omega-3 fatty acid and a derivative of linolenic/ alpha linolenic acid, present with impurities and additives that are intended solely for stabilization and transport.
- (iv) the impugned goods are used in a host of industries like food, beverage, dietary supplement, pharmaceutical and allied industries.
- (v) as per Note 1(a) of Chapter 29 of the Customs Tariff, the headings of the said Chapter apply to separate chemically defined organic compounds, 'whether or not containing impurities'.

- (vi) as per Note 1(f) of Chapter 29, the products mentioned in Note 1(a) may contain added stabilizers (including anti-caking agent) for their preservation or transport.
- (vii) it has not been shown by revenue as to why "Martech DHA" has acquired the characteristics of food preparation alone and is not for example an ingredient of the pharma or allied industry and takes the characteristics thereof.
- (viii) the Original Authority, Appellate Authority and Commissioner of Customs Mumbai have all found the goods classifiable under Chapter 29.
- (ix) the same goods imported by other importers and when manufactured domestically have also been classified under chapter 29 as mentioned in the OIO and is not refuted.
- (x) Boards letter dated 04/09/2017 is issued only to the Commissionerate and is not a general Circular meant to bring uniformity in classification of the same product across the country.

Hence Revenue has not been able to discharge the burden of proof as required to show that "Martech DHA" has acquired the characteristics of food preparation covered under chapter 21.

24. We find that it has been possible to finalize the classification within the parameters of the Customs Tariff with assistance from the HSN and reference to extrinsic sources was not required. In any case all the references made by revenue deal with situations where the product in question is not pure DHA with impurities and stabilisers alone. They refer to DHA not as a standalone product that has been

imported in bulk but rather to the product used, post their import, in the manufacture of infant formula, dietary supplements and various food products or manufactured and sold as dietary supplement or food ingredient/ food supplement in various food etc. The problem of end use-based classification of a multi-use product has been discussed above and found unsuitable.

25. The appellant-department has referred to two judgments of this Tribunal in the case of **M/s K-Link Healthcare (India) Pvt Ltd Vs Commissioner of Customs (AIR), Chennai** wherein the classification of BAE / K-Link Chlorophyll was upheld under CTH 2106 as a Nutritional Drink / Botanical Beverage as the said goods are marketed only as Nutritional Health Drink made from plant extract, and to Final Order No. 40364 / 2024 dated 28-3-2024 in **M/s Ajinomoto India Pvt Ltd Vs Commissioner of Customs, Chennai- II**, wherein Ajitide I + G [Disodium ribonucleotide) which was classified as a Chemical Mixture under CTH 3824 9900 was found rightly classifiable under CTH 2106 9060 as a food flavouring substance on the basis of trade parlance and its use. We find that the Hon'ble Apex Court in the case of **Union of India & Anr. Vs Major Bahadur Singh** [2006] 1 SCC 368], held that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases. Similarly in the case of K-Link Healthcare (supra) the goods are marketed as a Nutritional Health Drink made from plant extract. In the case of Ajinomoto India Pvt Ltd the issue was whether Ajitide I + G [Disodium ribonucleotide), was a flavouring material as per a specific heading found in the Customs Tariff or a chemical mixture when its

sole use was stated to be that of a taste enhancer. The facts are distinguished as in the present case the specific heading favours the appellant, as the goods are in their pure form and are not a single end use ingredient. Hence the judgments do not come to the help of revenue.

26. We find that while revenue has not been able to prove its case, the respondent has demonstrated that the correct classification of "Martech DHA" a derivative of linolenic acid, which is a separate chemically defined organic compound (DHA), is under Tariff Heading 2916 1590 of the Customs Tariff.

27. In the circumstances we do not have any hesitation in partially rejecting the appeal by upholding the impugned order with regard to classification of the impugned goods while setting aside the portion relating to time bar. We order accordingly. The respondent is eligible for consequential relief, if any, as per law. The appeal is disposed of on the above terms.

(Order pronounced in open court on 23.07.2024)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)